MOTION FILED
MAY 27 2003

Supreme Court, U.S.
FILED
MAY 27 2003
OFFICE OF THE CLERK

No. 02-1411

IN THE

Supreme Court of the United States

THE BOEING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.* BRETT ROBY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAMES J. GALLAGHER*
HERBERT L. FENSTER
BARBARA J. BACON
MCKENNA LONG &
ALDRIDGE LLP
444 S. Flower Street, Suite 800
Los Angeles, CA 90071
(213) 688-1000

Counsel for *Amicus Curiae*
Chamber of Commerce of the United States of America

May 27, 2003

*Counsel of Record

2 PP

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States of America ("the Chamber") requests leave to file the accompanying *amicus curiae* brief in support of the petition for a writ of certiorari. Respondent United States and Petitioner, The Boeing Company, consented to the filing of this brief. Respondent Roby did not.

As set forth in the accompanying brief, the Chamber represents more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. The Chamber often participates as *amicus curiae* in cases that raise issues of vital concern to the Nation's business community. This is such a case.

This case concerns the proper measure of damages under the False Claims Act. Because the Sixth Circuit's decision would permit the Government to recover consequential damages under the False Claims Act, the Chamber is concerned that businesses that do business with the Government may be exposed to damages well in excess of what Congress intended when it enacted the 1986 Amendments to the False Claims Act. In addition, the Chamber is concerned that, to the extent that the Sixth Circuit's decision allows the Government to recover consequential damages under the guise of direct damages, it unwittingly invalidates consequential damages exclusions in hundreds of commercial contracts. Because of its unique position in the business community, the Chamber is able to show the Court that this case is critical not only to Boeing but also to countless other contractors and businesses.

Moreover, when the Chamber declined to file a brief on behalf of Boeing below, Roby's counsel argued to the Sixth Circuit that Boeing could not get the Chamber "to support [Boeing's] stilted legal views . . ." Relator Brett Roby's Opposition to the Motion by Aerospace Industries Association of America, Inc. for Leave to File Brief as Amicus Curiae in Support of Boeing's Petition for Rehearing En Banc at 10 n. 14, *United States ex rel. Roby v. Boeing*, 302 F.3d 637 (6th Cir. 2002). Thus, a second reason for seeking leave to file this brief is to show that, contrary to Roby's contentions, the Chamber fully supports Boeing's position.

The Chamber's motion for leave to file the accompanying *amicus curiae* brief should be granted.

Respectfully submitted,

Robin S. Conrad
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

James J. Gallagher*
Herbert L.Fenster
Barbara J. Bacon
MCKENNA LONG &
ALDRIDGE LLP
444 S. Flower Street, Suite 800
Los Angeles, CA 90071
(213) 688-1000

*Counsel of Record for *Amicus Curiae* Chamber of Commerce of the United States of America

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST STATEMENT OF AMICUS CURIAE 1

REASONS FOR GRANTING THE WRIT 2

I. THIS COURT SHOULD RESOLVE THE IMPORTANT FEDERAL QUESTION OF WHAT CONSTITUTES DAMAGES ALLOWABLE UNDER THE FCA 2

II. THIS COURT SHOULD GRANT REVIEW TO PRESERVE THE PROPER DISTINCTION BETWEEN DIRECT AND CONSEQUENTIAL DAMAGES 8

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Cook County, Ill. v. United States ex rel. Chandler,
123 S. Ct. 1239 (2003) 3, 4, 8, 11

Gulf Oil Corp. v. Copp Paving Co.,
419 U.S. 186 (1974) 9

Hudson v. United States,
522 U.S. 93 (1997) 8

Russello v. United States,
464 U.S. 16 (1983) 9

Russo v. Hilltop Lincoln-Mercury, Inc.,
479 S.W.2d 211, 10 UCC 768 (Mo. App. 1972) 10

United States v. Aerodex, Inc.,
469 F.2d 1003 (5th Cir. 1972) 3, 5, 6, 8

United States v. Bornstein,
423 U.S. 303 (1976) ..... passim

United States v. Halper,
490 U.S. 435 (1989) 7, 8

United States v. Hibbs,
568 F.2d 347 (3d Cir. 1977) 4

United States v. Woodbury,
359 F.2d 370 (9th Cir. 1966) 4

United States ex rel. Compton v. Midwest Specialties,
142 F.3d 296 (6th Cir. 1998) 4

Page(s)

STATUTES AND RULES

31 United States Code
§§ 3729-3733 (1986) ..... passim
§ 3729(a) 3

Supreme Court Rules
Rule 37.6 1

OTHER AUTHORITIES

1 J. White & R. Summers, *Uniform Commercial Code*, § 10.4, 567 n.10 (4th ed. 1995) 9, 10

25 C.J.S. Damages § 2 (1966) 9

Black's Law Dictionary (7th ed. 1999) 1, 9

Restatement (Second) of Torts (1976)
§ 549(1)(b) 11, 12

S. Rep. No. 345, 99th Cong., 2d Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5284 6

INTEREST STATEMENT OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation.[1] It represents an underlying membership of more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. The Chamber regularly advocates its members' views in this Court and other appellate forums. It initiates and enters litigation involving issues of national concern to the American business community.

Many of the Chamber's members provide goods and services to the United States under government contracts. In performing those contracts, Chamber members often provide replacement components, conduct overhaul work, or remanufacture or upgrade existing defense systems. In addition, virtually all of the Chamber's members enter into commercial contracts, some of which contain consequential damages provisions that allocate the risks to which the contracting parties are subject.

Black's Law Dictionary (7th ed. 1999) defines "consequential damages" as "[l]osses that do not flow directly and immediately from an injurious act, but that result indirectly from the act." The Sixth Circuit's willingness to permit the recovery of the full replacement cost of an aircraft lost as the result of a defective component allows the Government to recover what are "consequential damages," despite the fact that the False Claims Act, 31 U.S.C. §§ 3729-

---

[1] Pursuant to Supreme Court Rule 37.6, the Chamber hereby affirms that no counsel for any party authored any part of this brief, and that no person or entity other than the Chamber and its legal affiliate, the National Chamber Litigation Center, Inc., provided financial support for its preparation or submission.

3733 (1986) ("FCA"), excludes consequential damages and provides instead for trebling of direct damages in lieu of consequential damages. This overreaching threatens to expand the risk of exposure for Chamber members under the FCA beyond limitations prescribed by Congress. Moreover, by obliterating the proper distinction between direct and consequential damages, the Sixth Circuit puts consequential damages provisions in the Chamber members' commercial contracts in jeopardy. Consequently, the Chamber has a strong interest in the proper resolution of this case.

The Chamber believes this Court should grant certiorari to resolve both questions presented in Boeing's petition, however, the Chamber addresses only the second question regarding the amounts permissible as damages under the FCA. The Chamber submits this brief to show the importance of that issue not just to the parties involved, but to the countless businesses that are affected by this case.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE IMPORTANT FEDERAL QUESTION OF WHAT CONSTITUTES DAMAGES ALLOWABLE UNDER THE FCA

Having erroneously concluded that the federally-mandated High Value Items Clause does not preclude the Government from recovering damages for loss of Government property under the FCA, the Sixth Circuit then considered the appropriate method to compute the Government's damages in this case. Its holding – that the Government may recover, as damages for the submission of a purportedly false claim in connection with remanufacturing work on a Government-owned aircraft, the full value of the lost aircraft, trebled – is inconsistent with: (1) the statute

itself; (2) *Cook County, Ill. v. United States ex rel. Chandler*, 123 S. Ct. 1239 (2003); (3) *United States v. Bornstein*, 423 U.S. 303 (1976); and (4) *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972).

The Sixth Circuit was improperly influenced by the assumed criticality of the defective part involved in this case. This is not, however, a case that is, or can be, controlled by common law notions of either contractual or tort "damages." Rather, this case is entirely a creature of federal statute.

The impact of the Sixth Circuit's holding on defense, aerospace and aviation contractors and subcontractors doing business with the Government is enormous: contractors who supply relatively small components or perform repairs now face potential liability for treble the entire value of multi-million and multi-billion dollar, complex defense systems. This holding, the Chamber respectfully submits, is contrary to express Congressional intent to exclude consequential damages from the FCA, and is out of line with Supreme Court and other precedent concerning FCA damages. In addition, the lower court's inclusion as direct damages of what are properly classified as consequential damages exposes parties to commercial contracts to unanticipated and unintended risks of financial disaster.

The FCA was not intended by Congress to be a mechanism for the Government to recover common-law like property damages caused by a defective component. The damages that are available under the FCA are those defined by the conduct prohibited by the statute – the submission of a false claim. 31 U.S.C. § 3729(a) (anyone who knowingly presents a false claim to the Government is liable for civil statutory penalties "plus 3 times the amount of damages which the Government sustains *because of the act* of that person") (emphasis added). The critical word is "act" and the

"act" is the submission of the false claim. Consequential damages are not available. *Chandler*, 123 S. Ct. at 1247 n.9 ("The treble damages provision was, in a way, adopted by Congress as a substitute for consequential damages"). Thus, where the statute focuses on the false claim itself, the phrase "because of" cannot be construed as opening the door to consequential damages.

In an FCA action for substandard goods, "the proper method for determining direct damages is the difference between the market value of the [goods] received and retained and the market value that the [goods] would have had if they had been of the specified quality." *Bornstein*, 423 U.S. at 317 n.13. It is clear from the context of *Bornstein* that the "goods" are *only* the components which are the express subject matter of the false claims and *not* an entire system in which the "goods" may be installed. In contrast to the Sixth Circuit's decision below, courts applying this "diminution in value" measurement of damages generally look to the contract price to establish the value of the goods as promised. *See, e.g., United States ex rel. Compton v. Midwest Specialties*, 142 F.3d 296, 304-05 (6th Cir. 1998) (affirming award of damages based on the contract price, which equaled the value of the goods contracted for less the value of the goods as delivered); *United States v. Hibbs*, 568 F.2d 347, 351 (3d Cir. 1977) (when a defective article is purchased in a fraudulent transaction, the measure of damages is the difference in cost as contracted for and as received); *United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir. 1966) ("Ordinarily, the measure of the Government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful").

As shown in *Aerodex*, a case neither distinguished nor discussed by the Sixth Circuit below, the FCA does not include as damages costs incurred as the result of the delivery of a defective product that are above and beyond the price of the defective product itself. 469 F.2d at 1011. In *Aerodex*, the Government filed an FCA action against Aerodex for making false claims for payment in connection with a $27,000 contract for manufacture of certain aircraft engine bearings. Aerodex delivered, and the Government accepted, bearings that did not comply with the contract specifications. When the Government later discovered that the bearings were noncompliant, it removed and replaced them at a cost of $161,000. *Id.* at 1006. The court held that, although Aerodex was liable under the FCA for the $27,000 paid by the Government for proper bearings it did not receive, the Government could not recover the $161,000 spent in removing and replacing the improper bearings because that damage was consequential in nature and not recoverable under the FCA:

> [T]he language of the False Claims Act does not include consequential damages resulting from delivery of defective goods. The statute assumes double damages attributable to the "act" which in this case is the submission of the false vouchers. The submission of these vouchers was not the cause of the Government's consequential damages. The delivery and the installation of the bearings in the airplanes, not the filing of the false claim, caused the consequential damages.
>
> In a case of this kind, damages under the False Claims Act must be measured by the amount

> wrongfully paid to satisfy the false claim (citations omitted).[2]

Id. at 1011. In other words, the Government cannot go outside the parameters of the contract and recover more than the contract price.

When Congress amended the FCA in 1986, it explicitly declined to overrule the holding in *Aerodex* and allow recovery of consequential damages. In fact, when Congress rejected the recovery of consequential damages under the FCA, it understood, citing to *Aerodex*, that replacement costs of a defective item would not be recoverable. *See* S. Rep. No. 345, 99th Cong., 2d Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5284. The Sixth Circuit was obliged to respect Congress's choice in this regard and therefore should have followed *Aerodex's* holding, limiting baseline FCA damages to the "amount wrongfully paid on the false claim." 469 F.2d at 1011.

Thus, in an FCA case involving a defective component, damages should be measured by the cost of the defective component, as opposed to the value of the item in which it was installed, so as to limit damages to the amount wrongly paid as a result of the false claim. Indeed, in *Bornstein*, this Court measured damages based on the value of the falsely marked tubes, not the value of the radio kits, of which they formed a part. *Bornstein*, 423 U.S. at 316 n.13. The Sixth Circuit here attempts to distinguish *Bornstein* on

---

[2] The *Aerodex* court noted that these consequential damages *were* recoverable as single damages under the claim for breach of warranty alleged in that action. *See* 469 F.2d at 1011-12. Due to the partial settlement reached by the parties in this case, no issue pertaining to breach of warranty damages is before this Court.

the grounds that "the invoices for radio kits that contained falsely marked electron tubes 'included claims for payment for the falsely marked tubes.'" *United States ex rel. Roby v. Boeing*, 302 F.3d 637, 646-47 (6th Cir. 2002). This distinction leads to the anomalous result that FCA damages for a false invoice containing separate line items for each component used in equipment would be less than the damages for an invoice that contained only one line item for the delivered equipment, even though actual damages are the same. In other words, if Boeing had included in its invoice for the remanufactured helicopter a separately stated claim for the $4,874 that Boeing paid for the gear, the damage to the Government would have been the same as it was in this case where "Boeing billed the Government for remanufactured helicopters as units, not as assemblages of assorted parts." *Id.* at 646. Yet, the Sixth Circuit rejected the argument that damages should be limited to the portion of the contract price attributed to the defective gear on the ground that *Bornstein* involved bills for assemblages of assorted parts, not units, even though the cost of the defective gear in this case was readily available. *Cf. United States ex rel. Roby v. Boeing*, 79 F. Supp. 2d 877, 880 n.6 (S.D. Ohio 1999) ("Relator asserts that Boeing paid Speco $4,874 for the cost of the defective gear . . ."), *aff'd* 302 F.3d 637 (6th Cir. 2002).

The FCA, however, provides damages only for that portion of a claim that is false. In the instant case, the amount wrongfully paid to satisfy the false claim is that portion of the contract price attributable to the defective gear. *Cf. United States v. Halper*, 490 U.S. 435 (1989) (accepting district court's measure of damages as difference between the improper billing rate of $12 per claim and the proper billing

rate of $3 per claim).[3] The rule that damages in an FCA case involving a defective component should be measured by the cost of the defective component, as opposed to the replacement cost of the item in which it was installed, limits damages to the amount wrongly paid as a result of the false claim. Had the Sixth Circuit followed the rationale of these precedents, it would have held that damages are to be measured by separating the portion of Boeing's claim that was false (*i.e.*, the cost attributable to the defective gear) from the entire claim (*i.e.*, the invoice delivered with the helicopter itself). Thus, not only is the Sixth Circuit's decision in direct conflict with the Fifth Circuit's holding in *Aerodex*, it is out of step with this Court's *Bornstein* and *Halper* decisions.

This Court should grant Boeing's petition to resolve this conflict, to provide the lower courts with further guidance on how to measure damages under the FCA, and to clarify that baseline damages are not to exceed the amount of the alleged false claim.

II. THIS COURT SHOULD GRANT REVIEW TO PRESERVE THE PROPER DISTINCTION BETWEEN DIRECT AND CONSEQUENTIAL DAMAGES

Congress contemplated including consequential damages language in the FCA when it amended the statute in 1986, but deliberately deleted this proposed language from the final enactment. Consequential damages therefore are not available under the FCA. *See Chandler*, 123 S. Ct. at 1247

---

[3] *Hudson v. United States*, 522 U.S. 93 (1997), disavowed *Halper*'s Double-Jeopardy Clause analysis, but did not disagree with *Halper*'s calculation of damages.

n.9. *See also, Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (when a provision is deleted before enactment, such action "strongly militates against a judgment that Congress intended a result that it expressly declined to enact"); *Russello v. United States,* 464 U.S. 16, 23-24 (1983) (same). Thus, Congress rejected the very damages that the Sixth Circuit would allow in this case.

If not overturned, the Sixth Circuit's ruling could significantly change the allocation of risks negotiated between parties to any contract that excludes consequential damages. As such, the Sixth Circuit's treatment of damages presents an inappropriate risk to the Chamber's members, and others, under commercial contracts as well as under the FCA.

Generally, consequential damages are defined as damages that "do[] not flow directly and immediately from the act of the party, but only from the consequences or results of such act." 25 C.J.S. Damages § 2 (1966). *See also Black's Law Dictionary* (7th ed. 1999) ("consequential damages" are "[l]osses that do not flow directly and immediately from an injurious act, but that result indirectly from the act").

As stated in Boeing's petition, the Sixth Circuit defined damages to include what are commonly recognized as consequential damages under the Uniform Commercial Code and the common law. Pet. at 29 (citing, as an example, 1 J. White & R. Summers, *Uniform Commercial Code*, § 10.4, 567 n.10 (4th ed. 1995).

Indeed, White and Summers would classify the replacement cost of the helicopter in this case as consequential damages:

> In *Russo v. Hilltop Lincoln-Mercury, Inc.*, [479 S.W.2d 211, 10 UCC 768 (Mo. App. 1972)], defective wiring caused a fire which destroyed the buyer's new automobile. The court awarded the buyer the full purchase price of the automobile without identifying that portion of the price which represented recovery for consequential damages. Only the difference between the automobile's warranted and actual value at the time of acceptance could be recovered as general damages under 2-714(2). The defective wiring system reduced the actual value of the automobile at the time of acceptance below the purchase price, but the defect did not render the auto worthless as of the acceptance date. A large part of the fire damage was therefore consequential. Had the parties excluded consequentials by contract, the court would have had to identify the value differential component of the buyer's total loss.

Id. at 567. White and Summers teaches that to properly exclude consequential damages, the value of a defective item is to be measured at the time of acceptance. Because the defective gear did not render the helicopter worthless at the time it was delivered, the Sixth Circuit erred in holding that its value was zero.[4]

---

[4] In this case, the Sixth Circuit effectively measured the value of the helicopter at the time of the accident. *Cf. Roby*, 302 F.3d at 647. The fact that the helicopter had some, likely substantial, value at the time that it was delivered is, however, evident in the fact that the Government did

(Footnote continued on next page)

The fact that the Government is *not* entitled to recover damages collateral to the underlying defect that causes a claim to be false is further supported by this Court's most recent FCA decision. In *Chandler*, this Court stated that the FCA does not expressly provide for the consequential damages that ordinarily are awarded for fraud. 123 S. Ct. at 1247. Rather, trebling was provided as the statutory quid pro quo as a substitute for consequential damages. *Id.*

In stating that consequential damages are typically awarded in non-FCA fraud cases, this Court cited section 549(1)(b) and Comment d of the *Restatement (Second) of Torts* (1976). 123 S. Ct. at 1247. Section 549(1)(b) declares that the measure of damages for common law fraud includes "pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation." *Restatement (Second) of Torts* at § 549(1)(b). Comment d to clause (1)(b) explains that:

> [a]lthough the most usual form of financial loss caused by participation in a financial transaction induced by a fraudulent misrepresentation is the lessened value of the subject matter due to its falsity, the loss may result from a purchaser's use of the article for a purpose for which it would be appropriate if the representation were true but for which it is in fact harmfully inappropriate. So, too, it may be the expense to which he has gone in preparation for a use of the article for which it

---

(Footnote continued from previous page)
not seek treble the replacement cost of any of the other remanufactured helicopters that also contained the defective Speco gears.

> would have been appropriate if the representation had been true.

Id. at 112. The comment then states that "[t]hese 'indirect' or 'consequential' damages resulting from the misrepresentation are recoverable if the misrepresentation is the legal cause of them . . ." *Id.*

Because the *Restatement (Second) of Torts* makes clear that losses caused by the use of a product fraudulently represented to be of a certain quality are considered consequential damages, it is clear that this Court understood that the FCA precludes recovery for the loss of a product suffered as a result of the Government's use of the product where, as alleged here, the contractor falsely certified that the product conformed to the contract. In this case, the loss of the helicopter resulted from the mishap caused by operating the helicopter with the defective gear, not from the filing of the false claim. Thus, the Sixth Circuit erred in holding that the Government could potentially recover the replacement cost of the helicopter. This is especially true given that the contract at issue here called for Boeing to refurbish a government-owned helicopter rather than to purchase and provide a refurbished helicopter.

In sum, the Sixth Circuit's damages methodology would dramatically change the nature of the FCA, converting it to a mechanism to recover consequential property damages - trebled - rather than one to recover monies paid to a contractor because of submission of a false claim. Indeed, permitting the Government to recover direct and consequential damages trebled would result in a huge over recovery. This is not what Congress or this Court intended. Moreover, the Sixth Circuit's willingness to permit the recovery of all damages necessary to make the Government whole for the destruction of the helicopter, despite the fact

that consequential damages are not compensable under the FCA, threatens to blur the line between direct and consequential damages. This, in turn, threatens to expand the category of damages available in numerous contracts excluding consequential damages beyond existing, well-established limitations. For parties who previously negotiated a lower price in return for assuming the risk of consequential damages, this could result in a windfall. For parties who believed the risk of consequential damages presented an unacceptable risk and, therefore, negotiated to exclude consequential damages, this could result in financial ruin.[5] Boeing's petition should be granted to permit this Court to correct the confusion regarding the definition of consequential damages engendered in the Sixth Circuit's decision.

---

5 Included in the Chamber members' contracts are contracts for commercial aircraft and satellites. The replacement cost of a single aircraft or satellite could be enormous. Thus, when a business installs a relatively small and/or inexpensive component on a high value item, it will often negotiate to limit its risk for such losses.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in Boeing's Petition for Writ of Certiorari, the Chamber respectfully requests this Court to grant Boeing's petition.

Respectfully submitted,

Robin S. Conrad
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

James J. Gallagher*
Herbert L.Fenster
Barbara J. Bacon
MCKENNA LONG &
ALDRIDGE LLP
444 S. Flower Street, Suite 800
Los Angeles, CA 90071
(213) 688-1000

*Counsel of Record for *Amicus Curiae* Chamber of Commerce of the United States of America